



COUNTY OF EL PASO

OFFICE OF THE COUNTY AUDITOR

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December 4, 2002

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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548
Attention: Opinion Committee

RQ-0005-GA

By Certified Mail, Return Receipt Requested

FILE # ML-42920-02
I.D. # 042920

Re: Authority of a Bail Bond Board to hire legal counsel and related questions.

Dear Attorney Greg Abbott:

I am soliciting your opinion on behalf of the El Paso County Bail Bond Board (the Board). My questions to you include the following: (1) is the Board a state or county entity; (2) does legal representation of the Board fall within the scope of the county attorney's constitutional and statutory duties; (2a) depending on your response to question 2, is the County Attorney's consent required in order for the Board to hire legal counsel or does the authority of the Board to employ persons necessary to assist the Board in its functions under Tex. Occ. Code § 1704.101(8) include the authority to hire an outside attorney over the objection of the County Attorney; (2b) depending upon your response to question 2, does financial oversight for contractual obligations and expenditures of funds rest with the Board or the County; (2c) depending upon your response to question 2b, may the County Auditor pay a claim for legal representation for the Board which was not authorized by the County Attorney; and (3) does representation of the Board by the County Attorney constitute a conflict of interest in that the County Attorney also represents the County and the State in the prosecution and collection of bail bond forfeitures?

Background

On September 25, 2002, the Board approved a motion to hire an attorney to represent it, subject to the El Paso County Auditor requesting and receiving an attorney general opinion that: (1) it is lawful for the Board to hire outside legal counsel over the objection of the El Paso County Attorney; and (2) it is lawful for the El Paso County Auditor to pay a claim for the outside counsel's fees under such circumstances. The Honorable José Rodríguez, El Paso County Attorney, has opined regarding many of these issues. However, some Board members and attorneys representing bail bond companies disagree with the County Attorney's opinions, which I have provided and are referenced throughout this request. The County Attorney actively fulfills the duties of legal representative to the Board, and there is no issue of dereliction of his duties.

1. Is the Board a state or county entity?

It is contended by some members of the Board that the Board is not a "county entity," and therefore need not seek legal advice from the County Attorney. Based on the El Paso County Attorney's analysis,

Garcia-Marroquin v. Nueces County Bail Bond Board, 1 S.W.3d 366, 372 (Tex. App.—Corpus Christi 1999, no pet.), cited in County Attorney Opinion 01-112, the following authorities expressly hold that the Bail Bond Board is a county entity: Dallas County Bail Bond Board v. Mason, 773 S.W.2d 586, 587 (Tex. App.—Dallas 1989, no writ) (holding that the Bail Bond Board is a "county board" and a "legal entity through which the county performs its governmental function"); Dallas County Bail Bond Board v. Stein, 771 S.W.2d 577, 579 (Tex. App.—Dallas 1989, writ denied) (holding that the Bail Bond Board is "a governmental agent of the county for purposes of regulating the bail bond industry."). The County Attorney therefore concluded, the Bail Bond Board is a county entity for the reasons explained in Opinion 01-112

2. Does legal representation of the Board fall within the scope of the county attorney's duties?

There is a dispute over whether the County Attorney is the exclusive attorney for the Board. The County Attorney addressed this issue in Opinion No. 01-112 and stated the following: "Regarding the duties of County and District Attorneys, Article V, Section 21 of the Texas Constitution provides as follows: A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. *The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.* The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary, and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold office for a term of four years, and until their successors have qualified.

Tex. Const. art. V, § 21 (emphasis added). The Legislature has provided a District Attorney for El Paso County. *Tex. Gov't Code Ann. § 43.120(a)* (Vernon Supp. 2001) ("The voters of Culberson, Hudspeth, and El Paso Counties elect a district attorney for the 34th Judicial District.") Accordingly, the Legislature has specified the scope of the County Attorney's courtroom duties, which are as follows:

(a) It is the primary duty of the county attorney in El Paso County or his assistants to represent the state, El Paso County, and the officials of El Paso County in all civil matters pending before the courts of El Paso County and any other courts in which the state, the county, or the officials of the county have matters pending.

(b) The county attorney has the powers, duties, and privileges relating to the prosecution of misdemeanors that relate to health and environmental matters and that relate to the prosecution of misdemeanors under *Section 32.42, Penal Code*.

(c) At the request of the district attorney, the county attorney may assist the district attorney in criminal cases in El Paso County.

(d) The county attorney in El Paso County performs the duty of collecting and processing checks and similar sight orders as provided under *Article 102.007, Code of Criminal Procedure*, and prosecutes misdemeanors where a check or sight order is the instrument by which the misdemeanor is committed.

Id. § 45.171. Under *Section 45.171(a)*, the El Paso County Attorney is expressly assigned the duty of handling all civil matters involving the county and county officials pending in court.

With respect to matters outside the courtroom, *Texas Government Code Section 41.007* provides as follows:

A district or county attorney, on request, shall give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official.

Id. § 41.007 (Vernon 1988). Although the phrase “on request” might suggest it is within a county official’s discretion whether to seek legal advice from a County or District Attorney, the Attorney General has clarified that “[t]he proviso ‘on request’ serves only to protect district and county attorneys from being considered derelict in their duty to advise if public officials fail or refuse to request assistance.” Op. Tex. Att’y Gen. No. JM-1281, 7 (1990). Further, refusal by a county official to seek legal advice from the County or District Attorney is improper: “[T]he commissioners court may not suspend a portion of the duties required by law to be performed by an elected legal officer by simply refusing to request advice the commissioners court deems necessary.” Id. Thus, Section 41.007 authorizes a County or District Attorney to provide legal advice to county officials whether they request it or not.

The effect of these three authorities, *Article V, Section 21* of the *Texas Constitution* and *Sections 45.171(a)* and *41.007* of the *Texas Government Code*, taken together, is “to compel the various officials of [El Paso] County to obtain representation and advice from the [El Paso] County Attorney, and him alone,” except where otherwise expressly provided by law. *Id.* at 5-6. The statutory duty of a County Attorney to advise county officials is “all-inclusive,” and there are “no county matter[s] which would not fall within the contemplation or definition of such duty.” *Id.* at 6. See also Jones v. Veltman, 171 S.W. 287, 290 (Tex. Civ. App.—San Antonio 1914, writ ref’d) (“[I]t was [the County Attorney’s] duty to advise [the Commissioners Court] in regard to all county matters. There could be no county matters about which advice was required that was ‘not contemplated or covered’ by his officials duties as County Attorney.”).

Thus, because the Bail Bond Board is a county entity, Garcia-Marroquin v. Nueces County Bail Bond Board, 1 S.W.3d 366, 372 (Tex. App.—Corpus Christi 1999, no pet.), representation of the

Board, both with regard to pending litigation and matters outside the courtroom, falls within the scope of the County Attorney’s duties.”

2(a). Is the County Attorney’s consent required in order for the Board to hire legal counsel or does the authority of the Board to “employ persons necessary to assist the Board in its functions” under Tex. Occ. Code § 1704.101(8) include authority to hire an outside attorney over the objection of the County Attorney?

It is contended by some members of the Board that, regardless of whether the Board is a county entity, the County Attorney’s consent to the hiring of outside counsel is unnecessary. They rely upon the authority of Tex. Occ. Code § 1704.101(8), which authorizes the Board to employ persons necessary to assist the Board in its functions. The County Attorney provides regular legal services to the Board, and there are no unmet legal needs. A bail bond administrator has been hired in reliance upon this statute.

Opinion 01-112 cites authorities holding that county entities cannot hire outside legal counsel without the County Attorney’s consent such as Op. Tex. Att’y Gen. No. JM-1281, 7 (1990) wherein it states, “The commissioners court may not suspend a portion of the duties required by law to be performed by an elected legal officer by simply refusing to request advice the commissioners court deems necessary”. The County Attorney’s contention is that because representation of the Board, both with regard to pending litigation and matters outside the courtroom, falls within the scope of the County Attorney’s duties, neither the Commissioners Court nor the Board may hire outside legal counsel to perform this function without the County Attorney’s consent.

2(b). Who is responsible for the financial oversight of the Board's expenditures?

Chapter 1704 of the Occupation Code provides that the Board shall deposit fees collected under this chapter in the general fund of the county. Tex. Occ. Code § 1704.101 (2). The board charges a fee of five hundred dollars (\$500.00) for each application filed. Tex. Occ. Code § 1704.154 (4)(D). Section 103 of the Act covers disbursements from the County Fund. The collected fees may be used only to administer and enforce this chapter.

The County Auditor is directed by Tex. Loc. Gov't Code Ann. § 112.06 to "see to the strict enforcement of the law governing county finances." The funds are deposited in the County's general fund. Nonetheless, the board asserts that it, and not the County Auditor, is ultimately responsible for approving the expenditure of collected fees. By contrast, it is the position of the County Auditor that he is ultimately responsible for verifying that the funds are applied to a proper purpose.

2(c). May the County Auditor pay a claim for outside legal representation approved by the Board but not authorized by the County Attorney?

Assuming the Board without concurrence of the County Attorney hires an attorney, payment of this attorney would not be in strict compliance with the law and would therefore be denied upon presentment for payment to the County Auditor. The County Auditor is directed by *Tex. Loc. Gov't Code Ann. § 112.006* to "see to the strict enforcement of the law governing county finances.". *Tex. Loc. Gov't Code Ann. § 113.064* further states a claim "may not be allowed or paid until it has been examined and approved by the auditor.". *§ 113.065* provides that "the county auditor may not audit or approve a claim unless the claim was incurred as provided by law.". Therefore, it is the County Auditor's duty to withhold approval of a claim "unless the claim was incurred as provided by law."

3. Does representation of the Board by the County Attorney constitute a conflict of interest in that the County Attorney also represents the State and the County in the prosecution of bail bond forfeitures?

Some members of the Board assert that the County Attorney has a conflict of interest which prohibits him from both representing the Board and prosecuting bail bond forfeiture judgments. The County Attorney asserts that there is no conflict because the dual duties of advising the Board and prosecuting bail bond forfeitures are aligned, rather than materially and directly adverse to one another. The County Attorney further asserts that, even if a conflict exists, it has been waived by the legislature. The issue is addressed at length in Opinion 01-152, issued by the County Attorney on August 22, 2001 wherein he states:

"The County Attorney's duty to advise the Bail Bond Board arises under Texas Government Code Section 41.007, which provides as follows:

A district or county attorney, on request, shall give to a county or precinct official of his district or county a written opinion or written advice relating to the official duties of that official.

Tex. Gov't Code Ann. § 41.007 (Vernon 1988). As discussed in El Paso County Attorney Opinion No. 01-112, when county entities such as the Bail Bond Board seek legal advice, they are required to seek it from the County Attorney, and the County Attorney is in turn required to provide such advice.

Further, the County Attorney's duty to prosecute bail bond forfeitures arises under *Article 2.02 of the Texas Code of Criminal Procedure*, which provides as follows:

The county attorney shall attend the terms of court in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone and, when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court. He shall represent the State in cases he has prosecuted which are appealed.

Tex. Code Crim. Proc. Ann. art. 2.02 (Vernon Supp. 2001) (emphasis added). See also *Tex. Gov't Code Ann. § 45.17 1(c) (Vernon Supp. 2001)* ("At the request of the district attorney, the county attorney may assist the district attorney in criminal cases in El Paso County."). Pursuant to these provisions, the District Attorney has requested that the County Attorney handle all bail bond forfeitures in El Paso County. See Affidavit of Jaime Esparza dated November 12, 1993 (Attachment "A"), and Letter from Jaime Esparza dated July 22, 1996 (Attachment "B").

The Texas Supreme Court has held that when the statutory duties of a government attorney create a conflict of interest, the statutes creating such duties take precedence over the rules regarding conflicts. Public Utility Comm'n of Texas v. Cofer, 754 S.W.2d 121, 125 (Tex. 1988) (holding that the Attorney General could not be compelled to withdraw from his statutory duty to represent two state agencies even though the agencies were directly opposed in litigation). The Court reasoned that "[i]f 'dual representation' does in fact create a conflict of interest, it is a problem of the Legislature's creation, and one that the Legislature must resolve." *Id.* at 126. Thus, even if the County Attorney's dual duties of advising the Bail Bond Board and prosecuting bail bond forfeitures did involve a conflict of interest, the County Attorney would not be precluded from performing either statutory duty. However, no such conflict exists.

The general rule regarding conflicts of interest is Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, which provides in relevant part as follows:

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

- (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
- (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Tex. Disciplinary R. Prof. Conduct 1.06 (1989), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. (Vernon 1998) (State Bar Rules art. X, § 9). Thus, the dual duties of advising the Bail Bond Board and prosecuting bail bond forfeitures give rise to a conflict of interest only if these duties involve materially and directly adverse interests or result in adversely limited representation. No such result follows from these duties.

Chapter 22 of the *Texas Code of Criminal Procedure* governs bail bond forfeitures. Forfeiture proceedings involve three main steps: declaration of forfeiture, trial, and final judgment. Article 22.02 sets forth the circumstances under which a declaration of forfeiture must be issued by the court in which a criminal case is pending:

Bail bonds and personal bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the courthouse door, and if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, if any, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown why the defendant did not appear.

Tex. Code Crim. Proc. Ann. art. 22.02 (Vernon 1989).

Further, Article 22.125 sets forth guidelines for trial in a forfeiture case:

After a judicial declaration of forfeiture is entered, the court may proceed with the trial required by Article 22.14 of this code. The court may exonerate the defendant and his sureties, if any, from liability on the forfeiture, remit the amount of the forfeiture, or set aside the forfeiture only as expressly provided by this chapter. The court may approve any proposed settlement of the liability on the forfeiture that is agreed to by the state and by the defendant or the defendant's sureties, if any.

Id. art. 22.125 (Vernon Supp. 2001).

Finally, Article 22.14 sets forth requirements relating to issuance of a final judgment:

When, upon a trial of the issues presented, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties, if any, for the amount in which they are respectively bound; and the same shall be collected by execution as in civil actions. Separate executions shall issue against each party for the amount adjudged against him. The costs shall be equally divided between the sureties, if there be more than one.

Id. art. 22.14 (Vernon 1989).

Thus, the State's interest in forfeiture litigation is to obtain favorable judgments and to collect on such judgments.

In contrast, the Bail Bond Board plays no role and therefore has no interest in the adjudication of forfeiture cases, either as a party or a tribunal. It does, however, have ministerial duties relating to the collection of forfeiture judgments under *Section 1704.204 of the Texas Occupations Code ("Section 1704.204")* and *Article 103.004 of the Texas Code of Criminal Procedure ("Article 103.004")*.

Section 1704.204 provides as follows:

- (a) A license holder shall pay a final judgment on a forfeiture of a bail bond executed by the license holder not later than the 30th day after the date of the final judgment.
- (b) If a license holder fails to pay a final judgment as required by Subsection (a), the judgment shall be paid from the security deposited or executed by the license holder under Section 1704.160.

Tex. Occ. Code Ann. § 1704.204 (Vernon Supp. 2001).

Further, Article 103.004 provides in relevant part as follows:

- (a) Except as provided by Subsections (b) and (c), an officer who collects recognizances, bail bonds, fines, forfeitures, judgments, jury fees, and other obligations recovered in the name of the state under any provision of this title shall deposit the money in the county treasury not later than the next regular business day after the date that the money is collected. If it is not possible for the officer to deposit the money in the county treasury by that date, the officer shall deposit the money in the county treasury as soon as possible, but not later than the third regular business day after the date that the money is collected.

- (b) The commissioners court of a county may authorize an officer who is required to deposit money under Subsection (a) to deposit the money in the county treasury not later than the seventh regular business day after the date that the money is collected.

Tex. Code Cnm. Proc. Ann. art. 103.004 (Vernon Supp. 2001).

Foreclosing on secured property and depositing the proceeds in the appropriate account are actions taken by the Bail Bond Board on behalf of the State and the County. Because the Board's duties with respect to forfeiture litigation are thus aligned with the interests of the State and the County, rather than materially and directly adverse to them, and because representation of none of these governmental bodies by the County Attorney is in any way limited by representation of the others, such representation presents no conflict of interest."

The County Attorney has therefore concluded "Because both advising the Bail Bond Board and prosecuting bail bond forfeitures fall within the scope of the County Attorney's statutory duties, the County Attorney is permitted to perform both duties regardless of whether there is a conflict of interest. However, no such conflict in fact exists."

Conclusion

The County Attorney has concluded that because the Bail Bond Board is a county entity, representation of the Board, both with regard to pending litigation and matters outside the courtroom, falls within the scope of the County Attorney's duties. Furthermore, the County Attorney concludes that only with his consent, may outside legal counsel be hired to represent the Board, whether such counsel is hired by the Commissioners Court to assist the County Attorney in the performance of statutory duties, or by the Bail Bond Board under *Section 1704.101* of the *Texas Occupations Code*. The County Attorney further concludes that even though under *Section 1704.101(8)* of the *Texas Occupations Code*, a Bail Bond Board may "employ persons necessary to assist in board functions, *Tex. Occ. Code Ann. § 1704.101* (Vernon Supp. 2001, no legal authority has construed this provision to permit the hiring of outside legal counsel to represent the Board. Assuming the Board hires an attorney without concurrence of the County Attorney, payment of this attorney would not be in strict compliance with the law *Tex. Loc. Gov't Code Ann. § 113.065* which provides that "the county auditor may not audit or approve a claim unless the claim was incurred as provided by law.". Therefore, it is the County Auditor's duty to withhold approval of a claim "unless the claim was incurred as provided by law.". Regarding the contention that there is a conflict of interest between the Board and El Paso County and the County Attorney should not represent both entities, the County Attorney concludes "because both advising the Bail Bond Board and prosecuting bail bond forfeitures fall within the scope of the County Attorney's statutory duties, the County Attorney is permitted to perform both duties regardless of whether there is a conflict of interest. However, no such conflict in fact exists."

The Honorable Greg Abbott
December 4, 2002
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I respectfully request a formal ruling from your office regarding the correctness of these conclusions.

Very truly yours,



Edward A. Dion
El Paso County Auditor

EAD:ya

Enclosures

cc: Mr. Mike Navarro, Bail Bond Board Administration/Director B.I.T. (SO)
The Honorable José Rodríguez, County Attorney
Mrs. Lee Shapleigh, Assistant County Attorney